Supreme Court, U.S.
FILED
OCT 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-369

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STEVEN R. O'DONNELL, Petitioner

v.

LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

I.

THE RESPONDENT HAS COMPLETELY MISINTERPRETED THE DECISION OF THE APPELLATE COURT

The respondent's reading of the opinion below is simply wrong. The union confuses the two distinct meanings of the term "burden of proof." In one sense, it denotes the duty of establishing a proposition by such a quantum of evidence that the law demands. In another sense, it designates the obligation resting upon a party to go forward with evidence to meet a prima facie case created against him. See 29 Am Jur 2d Evidence sections 123, 124.

The Appellate Court did not find that Mr. O'Donnell failed to make out a prima facie case and consequently failed to shift the burden of evidence to the union. The Appellate Court, based on matters not in evidence and testimony petitioner never had the opportunity to cross-examine, found on its own motion that Mr. O'Donnell failed to meet his burden of persuasion that union steward Motal received actual

notice of his resignation. Petition Appendix p. 14a-15a. This argument was not made by the union; it was a conclusion the court reached sua sponte. It is this lack of opportunity to cross-examine and this use of matters not in evidence to reverse the decision of the trial court that constitutes the blatant denial of due process of law that Mr. O'Donnell suffered unexpectedly at the hands of the Appellate Court.

Mr. O'Donnell established a prima facie case of actual notice to the union of his resignation when both he and Jim Bennett testified that he gave his union card to former union steward Ryan to give to current union steward Motal along with the message that he was out of the union. Petition Appendix p. 4a, 12a-15a. The act of tendering a union card back to the union is a valid resignation. Communication Workers Local 6135, 188 NLRB

144, 76 LRRM 1635 (1971).

By making out this prima facie case, Mr. O'Donnell shifted the burden of going forward with evidence to meet that case to the union. See 29 Am Jur 2d Evidence sections 124, 126. When the union failed to put either Ryan or Motal on the stand, the two witnesses within their control who had personal knowledge of the events, the trial court properly interrupted the proceedings to ask the relevancy of the testimony of Mr. Cheeseman, the union's only witness. Petition Appendix p. 16a.

When it became apparent that Mr. Cheeseman was not present at the time the events occurred, it was entirely within the discretion of the trial court as fact finder to infer that the testimony of the missing Ryan and Motal would be unfavorable to the union. Culbertson v. Shaw, 18 U.S. 584, 588 (1855); Tepper v. Campo, 398 Ill. 496 (1947). See 29 Am Jur

2d Evidence section 180. The trial court at that time awarded judgment to Mr. O'Donnell. There was never an opportunity to cross-examine the only witness brought against Mr. O'Donnell and it was a denial of due process for the Appellate Court to reverse the decision below on the basis of that short testimony and an offer of proof which is not even evidence.

This Court has found the opportunity to cross-examine to be a fundamental and substantial due process right. This deprivation of due process occurred as a result of the unexpected decision of the Appellate Court and petitioner immediately raised this issue in his subsequent petition for rehearing and his petition for leave to appeal before the Illinois Supreme Court. As such, petitioner has properly raised this substantial federal question below. Great Northern R. Co. v. SunBurst Oil & Refining Co., 287 U.S. 358,

366-67 (1932); Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 677-78 (1929). Furthermore, the lack of opportunity to cross-examine the only witness brought against Mr. O'Donnell renders the testimony elicited unworthy of use in a court of law and any inferences drawn from it cannot stand as an adequate and independent ground of state law in support of the decision. Petitioner respectfully requests this honorable Court to issue the writ of certiorari.

II

THE APPELLATE COURT'S DECISION INVALIDATES RESIGNATIONS OF WHICH THE UNION HAS RECEIVED ACTUAL NOTICE AND AS SUCH RESTRICTS A UNION MEMBER'S RIGHT TO RESIGN

The Appellate Court held that a resignation must be written, communicated to a union officer, or delivered to the union's business office in order to be effective. Petition Appendix p. 6a. This was the argument advanced by the union at

trial. Their reasoning was that such a restriction allows the union to keep track of its membership. Petition Appendix p. 17a.

The real reason behind this argument is the punishment of Mr. O'Donnell for working during the strike. The union seeks to elevate form over substance through an unwritten policy in order to invalidate Mr. O'Donnell's resignation and confiscate the wages he earned during the strike.

Mr. O'Donnell turned his union card over to former union steward Ryan to give to present union steward Motal with the message that he was out of the union. An independent witness corroborated the fact that Ryan then went across the street to confer with Motal.

One would have to be divorced from reality to believe Ryan did not tell Motal of Mr. O'Donnell's resignation.

Furthermore, it would be fantasy to believe Motal did not tell his superiors of the resignation. The actions of any workers who cross picket lines are of extreme importance to the union hierarchy. Mr. O'Donnell proved at trial that the union received actual notice of his resignation.

The union's unwritten policy adopted by the Appellate Court would invalidate this resignation, a resignation of which they received actual notice, because it was not made orally to an officer or delivered to their business office. All that is needed for an effective resignation is actual notice of an act of renouncement coupled with the intent to renounce. Black's Law Dictionary, 5th Ed. p. 1177. And the tender of a union card back to the union is a valid act of resignation. Communication Workers Local 6135, 188 NLRB 144, 76 LRRM 1635 (1971).

To the extent the Appellate Court's decision invalidates this resignation it restricts Mr. O'Donnell's federally protected right to resign. Pattern Makers' League v. NLRB, 105 S.Ct. 3064 (1985).

In re: Arbitration American Car & Foundry, 11 LRRM 2582 (1942) is inapplicable to this case. The arbitrator made his decision prior to the passing of the Taft-Hartley Act in 1947. Prior to that time, closed shop agreements were legal and an employee who resigned from the union would lose his job. See Pattern Makers' League v. NLRB, supra. The rule proposed by the arbitrator served to protect union members whose views diverged from those of the union from a charge that their views were tantamount to resignation, exposing them to discharge.

With the passage of the Taft-Hartley Act closed shop agreements were outlawed,

making the protection of this archaic rule unnecessary. Today the focus of unions is to restrict resignations and keep workers from exercising their federally protected right to refrain from concerted activity with the threat of confiscatory fines. The archaic authority of the respondent should not be used to invade or frustrate the overriding policy of voluntary unionism embedded in this nation's labor laws. Pattern Makers', supra; Scofield v. NLRB, 394 U.S. 423, 429 (1969).

Finally, the union in a footnote indicates that union "Parliamentary Rules" prohibit oral resignations. When asked by the trial court whether there was any written procedure for resignation within the union rules the response was negative. Petition Appendix p. 17a. Thus, the union has waived this argument. Petitioner never had the chance at trial to show that this particular "Parliamentary Rule"

applies only to high ranking officials at formal meetings of its legislative bodies and not to rank and file members. In any event, the union has argued before this Court that oral resignations to union officials are valid, so even they do not follow their own interpretation of this provision. Brief in Opposition p. 7.

CONCLUSION

For the reasons above, and those in the petition, petitioner respectfully requests this Court to issue the writ of certiorari.

Respectfully submitted,

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October 12, 1987